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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE FERNANDEZ LOPEZ, Defendant and Appellant.	G039736 (Super. Ct. No. 05HF1322) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

William J. Kopeny for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jose Fernandez Lopez challenges his convictions for burglary, forcible sodomy, forcible sexual penetration, and rape. Defendant contends insufficient evidence showed sexual penetration; the court wrongly instructed the jury on flight as evidence of consciousness of guilt; the court wrongly denied his new trial motion asserting ineffective assistance of counsel; and counsel acted ineffectively in other ways.

We affirm. The victim's testimony defendant's fingers entered her genitalia "maybe an eighth of an inch" sufficiently showed sexual penetration. The evidence defendant moved to Merced after the police obtained a DNA sample from him warranted a flight instruction, and the instruction given correctly stated the law. The record shows no prejudicial, deficient performance by counsel.

FACTS

The Sexual Assaults

Karen B. was lying on her couch in her Costa Mesa apartment early one morning in 2004 when a man wearing a ski mask climbed on top of her. She told him to stop. The man penetrated her outer genitalia with his fingers "maybe an eighth of an inch," unsuccessfully attempted vaginal intercourse, and then had anal intercourse with her. The man pulled up his ski mask during the attack. Karen saw he was Hispanic and realized she had seen him once before at the apartment complex.

Karen went to the hospital, where a forensic nurse examiner conducted a sexual assault examination and collected anal swabs. A forensic scientist isolated semen from the anal swabs and entered its DNA profile into a computer database.

Patricia C. was sleeping on her sofa bed in her apartment in the same Costa Mesa complex in May 2005 when a man climbed on top of her. She tried to push him off. As they struggled, the man had vaginal intercourse with her. Patricia escaped

momentarily when the sofa bed folded in on itself, but the man grabbed her leg and pulled her toward him. He then had anal intercourse with her.

Patricia later reported the attack to the police. A forensic scientist collected a semen sample from Patricia's sheets. The DNA profile from that sample matched the sample collected from Karen.

Police detectives went to the apartment complex in June 2005 to warn residents and collect voluntary DNA samples from male residents. The detectives spoke with defendant at the apartment he shared with his brother. Defendant allowed the detective to swab his mouth. Defendant's DNA profile matched the profiles of the victims' assailant.

The next month, defendant left his $20 per hour landscaping job. He told his employer he needed to "take care of property in Mexico." Instead, defendant actually moved to Merced to take a $11 per hour construction job under the name "M. Jose Fernandez."

Detectives watching the apartment complex arrested defendant on July 29, 2005. Defendant initially claimed he was his brother, but admitted his true identity when confronted with his driver's license photograph. A blood sample was collected from defendant. DNA from the blood sample matched the DNA profile from defendant's earlier oral swab.

The DNA profile from both of defendants' samples matched the DNA profile of Karen's and Patricia's assailant — each showed the same rare genetic mutation, and the chance that unrelated persons would have that DNA profile was less than one in one trillion.[1]

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[1] Defendant's brother was specifically excluded as a possible source of the DNA.

After trial, a jury found defendant guilty of two counts of burglary (Pen. Code, §§ 459, 460, subd. (a)),[2] two counts of forcible sodomy (§ 286, subd. (c)(2)), one count of forcible sexual penetration (§ 289, subd. (a)(1)), and one count of rape (§ 261, subd. (a)(2)). It found defendant committed each of the sexual offenses during the commission of a burglary (§ 667.61, subds. (a), (d)) and against multiple victims (§ 667.61, subds. (b), (e)). The court denied defendant's new trial motion and sentenced him to a total term of 62 years to life in state prison.

DISCUSSION

Substantial Evidence Supports the Forcible Sexual Penetration Conviction

Defendant contends insufficient evidence supports the forcible sexual penetration conviction. He notes Karen testified his fingers penetrated her genitalia "maybe an eighth of an inch." He contends the word "maybe" reduces her testimony to sheer speculation or, at most, an insufficient modicum of evidence. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 320 ["a 'modicum' of evidence [cannot] by itself rationally support a conviction beyond a reasonable doubt"].)

Settled principles exist for reviewing insufficient evidence claims.[3] "'The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) We "view the evidence in the light most favorable" to the

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[2] All further statutory references are to the Penal Code.

[3] Because the standard of review is so well-settled, we decline defendant's extended invitation to scrutinize *People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1765, which stated, "Before a judgment of conviction can be set aside for insufficiency of the evidence to support the trier of fact's verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it."

verdict, and presume the existence of every fact the jury might reasonably deduce from it. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Karen's testimony — in context — sufficiently shows sexual penetration. She testified on direct examination: "When you say that [the assailant] fondled your vagina, was that skin-to-skin contact? [¶] A: Yes, it was. [¶] Q: Okay. And did he actually stick his fingers inside of your vagina? [¶] A: No. [¶] Q: Okay. Now, when you say inside of your vagina, I want — [¶] A: Oh, God, you don't got a visual for that one, do you? [¶] Q: No, it's a tissue box. I'm going to show you a tissue box here, Karen. [¶] A: I'm like — God. [¶] Q: I'm showing you this tissue box. [¶] A: Is this supposed to be a vagina? [¶] Q: It's all I have. Work with me. [¶] So, you have this tissue box, this being the outside of your vagina. Do you see this entrance here, okay? [¶] A: Yeah. [¶] Q: Okay. Imagine in these, this plastic coating being the, like the outside lips of your vagina. Did he actually put his fingers inside the lips of your vagina? A: The lips of the vagina are called the labia, Heather. [¶] Q: Did he — thank you. [¶] A: It was on the outside of the vagina of the lips, the labia. [¶] Q: Okay. So just for the record, you did just place your fingers inside here, though? [¶] A: Yeah, but it was, I mean it wasn't — it was like maybe, maybe that (indicating). Yeah. [¶] Q: For the record, the witness was demonstrating with her finger. Could you give me an estimate in inches because I wasn't sure what part of your finder — [¶] A: Maybe an eighth of an inch. [¶] Q: But he — just an eighth of an inch inside your vagina? A: Un-huh. Q: Is that a 'yes'? A: Yes."

The jury reasonably could have understood the victim's testimony and demonstration to mean defendant placed his fingers inside her labia majora. And it reasonably could have understood "maybe" to indicate only that the victim could not provide an precise measurement of the extent of the penetration, other than it was approximately an eighth of an inch — as she tried to demonstrate on the tissue box.

That degree of penetration constitutes sexual penetration. "'Sexual penetration' is the act of causing the penetration, however slight, of the genital or anal opening . . . ." (§ 289, subd. (k)(1).) Contact with any of the female external "genitalia inside the exterior of the labia majora constitutes 'sexual penetration' within the meaning of section 289." (*People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371.) Viewed "in the light most favorable" to the verdict (*People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206), Karen's testimony sufficiently supports the forcible sexual penetration conviction.

The Court Properly Instructed the Jury on Flight

Defendant contends the court erred by giving a modified version of CALCRIM No. 372, the standard form jury instruction on flight as evidence of consciousness of guilt. Defendant relies upon the delay between defendant's July 2005 relocation and any purported precipitating event: the 2004 attack on Karen, the May 2005 attack on Patricia, or the June 2005 police interview and DNA sample. He asserts this time lag shows a flight instruction was not warranted. He similarly complains the modified instruction did not require "immediate" flight. Finally, he contends the instruction should have been limited to some particular count.

Section 1127c provides: "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: [¶] The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine."

At the prosecution's request and over the defense's objection, the court modified CALCRIM No. 372 to instruct the jury: "If the defendant fled or tried to flee *after he became aware that he may be accused* of committing a crime, that conduct may

show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."[4] (Italics added.)

"'[A] flight instruction is proper whenever evidence of the circumstances of defendant's departure from the crime scene or his usual, . . . logically permits an inference that his movement was motivated by guilty knowledge.'" (*People v. Lucas* (1995) 12 Cal.4th 415, 470 (*Lucas*).) "'Flight manifestly does require, however, a purpose to avoid being observed or arrested.'" (*People v. Visciotti* (1992) 2 Cal.4th 1, 60.) The flight instruction does "not assume that flight was established, leaving that factual determination and its significance to the jury." (*Id*. at p. 61.) "[T]he facts of each case determine whether it is reasonable to infer that flight shows consciousness of guilt." (*People v. Mason* (1991) 52 Cal.3d 909, 941 (*Mason*).)

Here, the evidence warranted a flight instruction. The jury could reasonably infer from defendant's relocation from "'his usual environs'" (*Lucas*, *supra*, 12 Cal.4th at p. 470) in Costa Mesa, to take a lesser paying job in Merced, that he was "'motivated by guilty knowledge'" (*ibid.*) and had "'a purpose to avoid being . . . arrested'" (*People v. Visciotti*, *supra*, 2 Cal.4th at p. 60) after the police interviewed him and took his DNA sample a month before.

Defendant protests that section 1127c calls for a flight instruction when the defendant flees "immediately" after the crime or an accusation. But the statute allows for an instruction that "substantially" complies with its provision. (§ 1127c.) "As the statute

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[4] Unmodified, CALCRIM No. 372 provides: "If the defendant fled [or tried to flee] (immediately after the crime was committed/ [or] after (he/she) was accused of committing the crime), that conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the defendant fled [or tried to flee], it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled [or tried to flee] cannot prove guilt by itself."

indicates, and as the cases have held [citations], the giving of an instruction on flight in language which varies slightly from that of section 1127c is not error." (*People v. Hill* (1967) 67 Cal.2d 105, 120.)

And the California Supreme Court has repeatedly endorsed flight instructions where the flight was less than "immediate." To the contrary, it has rejected any "inflexible rules about the required proximity between crime and flight." (*Mason, supra,* 52 Cal.3d at p. 941 [four-week delay]; accord *People v. Santo* (1954) 43 Cal.2d 319, 329-330 [one-month delay].) There is no "defined temporal period within which the flight must be commenced." (*People v. Carter* (2005) 36 Cal.4th 1114, 1182 [delay of "days"].) "Common sense . . . suggests that a guilty person does not lose the desire to avoid apprehension for offenses as grave as multiple murders after only a few weeks." (*Mason,* at p. 941.) The same is true of rape and the similarly serious sexual offenses at issue here, which resulted in a sentence of 62 years to life. Given the circumstances of this case, the flight instruction properly stated the law.

Finally, the jury was instructed to "decide the meaning and importance" of the flight evidence, which properly allowed the jury to determine on which counts the evidence implied consciousness of guilt. *Santo* is instructive. There, the defendants contended their flight indicated consciousness of guilt of uncharged crimes. (*People v. Santo, supra*, 43 Cal.2d at p. 330.) The court acknowledged, "It is true that the evidence . . . does not specifically and directly evidence consciousness of guilt of the [charged offense], any more than it evidences consciousness of guilt of the [uncharged offenses]," but concluded "[i]t was for the jury to determine the weight, if any, against defendants of such evidence." (*Ibid.*; accord *Mason, supra,* 52 Cal.3d at p. 942.) The same point holds here. It is for the jury to determine the weight of the flight evidence and whether it shows consciousness of guilt of none, some, or all of the charged offenses.

In any event, the flight evidence was inconsequential given the overwhelming "one in one trillion" DNA evidence showing guilt. No reasonable

probability exists that any error in the flight instruction affected the verdict. (*People v. Silva* (1988) 45 Cal.3d 604, 628; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The Ineffective Assistance Claims Fail

Defendant lambasts his defense counsel on several grounds. In his new trial motion, he asserted counsel provided ineffective assistance by failing to interview the victims, failing to conduct forensic testing of the crime scenes, failing to move to suppress the DNA evidence, failing to call witnesses to rebut the flight evidence, and failing to call his wife as an alibi witness. For the first time on appeal, defendant complains counsel failed to object to evidence of prior uncharged conduct (jumping a neighbor's fence), failed to object to Karen's statements to her neighbor and the police, and failed to offer evidence Patricia could not identify him at the preliminary hearing.

To prevail on his ineffective assistance claims, defendant must show (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).)

As to the first prong — deficient performance — a "strong presumption" exists that counsel acted professionally. (*Strickland, supra,* 46 U.S. at p. 689.) For the claims raised in the new trial motion, we defer to the trial court's determination "whether counsel's acts or omissions were those of a reasonably competent attorney." (*People v. Jones* (1981) 123 Cal.App.3d 83, 89.) That court is in the better position to make such a determination based on its own observations. (*Ibid*.) For the claims raised initially on appeal, we "defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel." (*Lucas, supra*, 12 Cal.4th at p. 436.) "If the record . . . fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must [generally] be rejected on appeal." (*People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069.)

As for the second prong — prejudice — "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[5] (*Strickland, supra,* 466 U.S. at p. 694.) "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." (*Strickland,* at p. 697.)

The threshold issue is whether defense counsel should have moved to suppress the DNA evidence — evidence so overwhelming its admission renders any purported deficiencies harmless. Defendant contended in his new trial motion defense counsel should have moved to suppress the DNA evidence on the ground the police obtained his DNA sample through an illegal seizure. He supported this claim with his declaration, in which he conceded the police asked him for a sample and he "said o.k," but claimed he did not understand English well and would have refused to consent had he understood he could do so. Defense counsel offered a declaration stating he did not move to suppress the DNA evidence "because [he] believed this evidence was collected with the consent of [defendant] based on [his] review of the police reports."

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[5] Defendant misplaces his reliance upon *United States v. Cronic* (1984) 466 U.S. 648, where the defense's abject failure to contest the prosecution required per se reversal. (*Id*. at p. 658-659.) Defense counsel actively participated in the trial as an adversary. (See *Florida v. Nixon* (2004) 543 U.S. 175, 190; *People v. Dunkle* (2005) 36 Cal.4th 861, 885, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The ineffective assistance claim hinges on the likely merits of the suppression motion. "Counsel does not render ineffective assistance by failing to make motions . . . that counsel reasonably determines would be futile." (*People v. Price* (1991) 1 Cal.4th 324, 387.) And as defense counsel indicated in his declaration, the merits of that motion turn on whether defendant consented to the seizure.

"[T]he question whether a consent to a search [or seizure] was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227.) "The question of the voluntariness of the consent is to be determined in the first instance by the trier of fact; and in that stage of the process, 'The power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor proper exercise of that power, and the trial court's findings — whether express or implied — must be upheld if supported by substantial evidence.'" (*People v. James* (1977) 19 Cal.3d 99, 107 (*James*).)

Substantial evidence suggests defendant knowingly and voluntarily consented to submitting the DNA sample. He conceded answering the police's request for a sample, "o.k." The court impliedly found not credible his claim he could not understand English well enough to knowingly consent. (*People v. James, supra,* 19 Cal.3d at p. 107 [court determines credibility]; see also *People v. Quesada* (1991) 230 Cal.App.3d 525, 533 [court discredited defendant's claim in declaration not to understand English].) At trial, defendant's former employer of six years testified he was able to communicate with defendant in English. The police detectives testified they spoke with defendant in English. And the police had no duty to inform defendant he could refuse to consent. (*U.S. v. Drayton* (2002) 536 U.S. 194, 206-207.) The record amply supports the court's implied finding on the new trial motion that defense counsel reasonably concluded a suppression motion would be futile. (See *People v. Jones, supra,* 123

Cal.App.3d at p. 89 [deferring to trial court's assessment of counsel's performance]; see also *People v. Price, supra,* 1 Cal.4th at p. 387 [counsel need not bring motion reasonably determined to be futile].)

Given the overwhelming DNA evidence, which defense counsel reasonably determined would not be suppressed, we need not address the other claimed deficiencies. They could have caused no prejudice. (See *Strickland, supra,* 466 U.S. at pp. 694, 697.) This was not a close case. The jury deliberated for less than 90 minutes before convicting defendant on all counts. Even if defense counsel had performed as defendant now wishes, it would not reasonably have resulted in a more favorable determination. (*Ibid.*)

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.